

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

ART INSTITUTE OF PHILADELPHIA

Employer

and

Case 4–RC–20186

ATLANTIC INDEPENDENT UNION

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The Employer operates a post-secondary degree educational institution in Philadelphia, Pennsylvania (herein called the Art Institute). The Petitioner seeks to represent a unit consisting of the Employer's Technical Support Supervisor, Lead Service Support Technician, and approximately three Computer Technicians. The parties agree as to the appropriateness of the petitioned-for unit but disagree with respect to the unit placement of

Technical Support Supervisor Michael Rinaldi. The Employer would exclude Rinaldi from the unit as a supervisor within the meaning of Section 2(11) of the Act.

Michael Rinaldi has been employed by the Employer since October 1, 2000. However, he has been on a leave of absence for health-related reasons since February 26, 2001.¹ Rinaldi, who specializes in handling network issues, reports to Donna Panzo, the Employer's Director of Technology. Panzo served as the Technical Support Supervisor during the five months preceding Rinaldi's hire. The Computer Technicians² are responsible for maintaining the Employer's computer laboratories and equipment. Each of the Computer Technicians has a specific area of responsibility. One Computer Technician is primarily responsible for the "Mac" computers, another specializes in three-dimensional computer programs and computer animation, and a third is responsible for dealing with administrative problems.

Computer Technicians receive their daily assignments from an assignment list. The list is created from "bug sheets," i.e. lists of computer-related problems submitted by the Art Institute's students and staff members. The Technology Department also receives telephone calls requesting correction of computer problems on a more immediate basis. Most of the Computer Technicians' assignments are within their areas of specialization.

At the time of Rinaldi's hire, the Employer was moving eleven computer laboratories between buildings and installing a new computer network, among other major projects. Because of these circumstances, Rinaldi spent the first two or three months of his employment dealing almost exclusively with technical issues, and Panzo made assignments to the Computer Technicians. In January Rinaldi began making the daily assignments. He based his assignments on the Computer Technicians' areas of expertise and the Art Institute's priorities. He gave Panzo a copy of the list each day, and she frequently met with him to discuss the assignments. Rinaldi testified that when he asked the Computer Technicians whether they had completed the assigned tasks, they often told him that Panzo had changed the assignments and required them to perform different tasks. In this regard, when students or staff members telephoned the Technology Department requesting assistance or repairs, Panzo generally called a Computer Technician directly and assigned the task without consulting Rinaldi. Rinaldi estimated that Panzo countermanded about nine out of every ten tasks that he assigned, although Panzo estimated that she only changed Rinaldi's assignments about once or twice a week. According to Rinaldi, because he was unsuccessful in getting Panzo not to change the tasks that he had assigned, he stopped assigning tasks. Rinaldi performed tasks on the bug sheet rather than assigning them. In late January or February, when Panzo learned that Rinaldi had stopped assigning tasks, she told him that he should not have stopped assigning tasks and that she would attempt to distribute assignments through him rather than change his assignments. Nevertheless, on one occasion, Panzo told Rinaldi that he could not change an assignment that she had previously made. Rinaldi estimated that during the time that he created the assignment lists, he spent about ninety percent of his time performing technical duties and the remainder of his time assigning work.³

¹ All dates are between October 2000 and February 2001 unless otherwise indicated.

² "Computer Technicians," as used in this Decision, includes the Lead Service Support Technician.

³ Panzo estimated that Rinaldi spent eighty to ninety percent of his time performing technical duties.

Rinaldi has played no role in transferring, laying off or evaluating employees, and he has had no authority to process grievances. With respect to hiring, the record shows that on one occasion, Rinaldi reviewed thirty resumes and selected four candidates to interview for a Computer Technician position. Panzo interviewed these four candidates, as well as others not recommended by Rinaldi. Rinaldi participated in two of the interviews. Panzo initially offered the vacant position to an individual who was not one of the four selected for interview by Rinaldi, but the individual chose not to accept it. Panzo then hired a family friend of Rinaldi. While Panzo testified that Rinaldi recommended this individual for hire, Rinaldi testified that he did not tell Panzo that he knew this individual until after the individual had already been hired. In December, Panzo promoted Computer Technician Michael Kalai to the position of Lead Service Support Technician without first seeking Rinaldi's views. Panzo explained that she did not ask for Rinaldi's input because he had not been employed by the Employer long enough to have had sufficient opportunity to observe Kalai's work. On one occasion, Panzo expressed dissatisfaction to Rinaldi that an employee was often on the telephone with his girlfriend, and Rinaldi then asked the employee not to use the telephone for personal matters. There is no other evidence suggesting that Rinaldi has been involved in any disciplinary matters. At another time, Panzo received a complaint from an employee that Rinaldi had spoken in a disparaging manner about another employee. Panzo discussed the matter with Rinaldi. Panzo told Rinaldi that he was accountable for the Computer Technicians' performance but that he was not permitted to discharge anyone.

Rinaldi receives \$16,000 more per year than the highest salaried Computer Technician, and he receives the same benefits as the Computer Technicians. Unlike the Computer Technicians Rinaldi does not fill out timesheets, but Panzo, not Rinaldi, reviews the Computer Technicians' timesheets.⁴ Computer Technicians are eligible for overtime pay, but Rinaldi is not eligible. Panzo, not Rinaldi, has the authority to grant time off to Computer Technicians. Rinaldi is listed as a member of management on the Employer's electronic mail list, but he has not been invited to attend management meetings or a supervisory seminar.⁵ He has conducted training sessions for faculty and students, as have Computer Technicians. Computer Technicians have not brought work-related problems to him during his tenure of employment.

As Director of Technology, Panzo is responsible for strategic planning and for supervising the Technology Department, including Rinaldi. When Panzo served as Technical Support Supervisor, she was authorized to hire, fire, grant time off, approve overtime, promote, assign, prioritize, and direct the work of the Computer Technicians. She prepared evaluations for Computer Technicians that resulted in wage increases.⁶ She also approved the Computer Technicians' timesheets and she, along with her supervisor, formulated the 2001 budget for the Technology Department. She additionally determined the priorities for the Computer Technicians' assignments and delegated these duties, based on her knowledge of the Computer Technicians' skills and expertise.

⁴ Panzo reviewed the Computer Technicians' time sheets when she was the Technical Support Supervisor.

⁵ When Rinaldi asked Panzo if he should go to a management meeting in January she said it was not necessary because she was going. The supervisory seminar was held in Florida in October, less than a month after Rinaldi started work.

⁶ The Employer contends that Rinaldi has the authority to prepare the evaluations, but no Computer Technician has been scheduled for an evaluation during Rinaldi's tenure.

When Rinaldi first became the Technical Support Supervisor, Panzo and the Human Resources Director told him that he would be responsible for supervising the Technology Department and for delegating and prioritizing the Computer Technicians' tasks.⁷ Panzo created a job description for the Technical Support Supervisor in May 2000 when she was employed in that position. The job description states that the Technical Support Supervisor, *inter alia*, "provides leadership and supervisor [sic] of technology support efforts at the individual Art Institute level," "manage[s] activities of the computer labs and technology staff, including budget, staffing and training plans," and "supervises Computer Lab Technician(s), Computer Network manager, student help."⁸ Rinaldi, however, testified that he was never given the job description.⁹ Panzo testified that in the period of October through December she retained supervisory responsibility for the department. According to Panzo, she retained responsibility because Rinaldi was new to the position and needed to be involved exclusively with technical matters in view of the installation of the new computer network and the move of the computer laboratories.

A finding of supervisory status is warranted only where the individual in question possesses one or more of the indicia set forth in Section 2(11) of the Act. *Providence Hospital*, 320 NLRB 717, 725 (1996), *enfd.* 121 F.3d 548 (9th Cir. 1997); *The Door*, 297 NLRB 601 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Industries*, 311 NLRB 109, 110 (1993), *enfd.* 819 F.2d 439 (4th Cir. 1987).

The powers enumerated in Section 2(11) are termed the 'primary' indicia. When the issue of supervisory status presents a borderline question, 'secondary' indicia may be considered, but secondary indicia alone will not confer supervisory status under the Act. *Adco Electric, Inc.*, 307 NLRB 1113, 1120 (1992) (citations omitted), *enfd.* 6 F.3d 1110 (5th Cir. 1993). *Providence Hospital*, *supra* at 725. The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Id.*; *Juniper Industries*, *above* at 110. The authority effectively to recommend, "generally means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation ultimately is followed." *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982) (emphasis in original). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Robert Greenspan, DDS*, 318 NLRB 70, 76 (1995), *enfd. mem.* 101 F.3d 107 (2nd Cir. 1996), *cert. denied* 519 U.S. 817 (1996), citing *NLRB v. Lindsay Newspapers*, 315 F.2d 709, 712 (5th Cir. 1963); *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), *enfd.* 961 F.2d 1578 (6th Cir. 1992). Job descriptions or job titles suggesting the presence of supervisory authority are not given controlling weight. Rather, the Board insists on evidence supporting a finding of actual authority

⁷ Panzo could not recall whether she ever told Rinaldi that he would have any involvement in hiring, firing, disciplining, promoting, or evaluating employees or granting time off.

⁸ The Employer does not employ a Computer Network Manager, and Rinaldi has not been involved in supervising any students.

⁹ The Employer's current Human Resources Director testified that the Employer's practice is to give new employees their job descriptions during the orientation process. She was not the Director of Human Resources at the time of Rinaldi's hire. Rinaldi testified that he saw a draft job description prepared in 1999 which differed from the one prepared by Panzo. That document also indicated that the position is supervisory.

as opposed to mere paper authority. *East Village Nursing Center v. NLRB*, 165 F.3d 960, 962-63 (D.C. Cir. 1999); *Food Store Employees Local 347 v. NLRB*, 422 F.2d 685, 689 (D.C. Cir. 1969); *NLRB v. Security Guard Service*, 384 F.2d at 149; *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

The burden of establishing supervisory status is on the party asserting that such status exists. *Fleming Companies*, 330 NLRB No. 32, fn. 1 (1999); *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993); see *Bennett Industries*, 313 NLRB 1363 (1994). The Board has cautioned that the supervisory exemption should not be construed too broadly because the inevitable consequence of such a construction would be to remove individuals from the protections of the Act. *Providence Hospital*, 320 NLRB at 725; *Northcrest Nursing Home*, above at 491. Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, 295 NLRB at 490. The legislative history of Section 2(11) makes it clear that Congress intended to distinguish between employees performing minor supervisory duties and supervisors vested with genuine management prerogatives, and did not intend to remove individuals in the former category from the protections of the Act. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1974), reprinted in 1 Legis. Hist. 407, 410 (LMRA 1947). The legislative history also shows that Congress considered true supervisors to be different from lead employees or straw bosses that merely provide routine direction to other employees as a result of superior training or experience. *Id.*, reprinted at 1 Legis. Hist. at 410 (LMRA 1947). *Providence Hospital*, supra at 725; *Ten Broeck Commons*, 320 NLRB 806, 809 (1996). An individual will not be found to be a supervisor unless he or she has a “kinship to management.” *Advanced Mining Group*, 260 NLRB 486, 507 (1982), enfd. mem. 701 F.2d 221 (D.C. Cir. 1983), quoting *NLRB v. Security Guard Service*, 384 F.2d 143, 149 (5th Cir. 1969), enfg. 154 NLRB 8 (1965). See *Adco Electric*, 307 NLRB at 1120. Further, supervisory direction of other employees must be distinguished from direction incidental to an individual’s technical training and expertise, and technical employees will not be found to be supervisors merely because they direct and monitor support personnel in the performance of specific job functions related to the discharge of their duties. *Robert Greenspan, DDS*, 318 NLRB at 76; *New York University*, 221 NLRB 1148, 1156 (1975).

It is undisputed that Rinaldi has had no role in firing, promoting, transferring, laying off, recalling, rewarding, or granting time off to employees. The Employer’s claim of supervisory status rests on its assertion that Rinaldi has the authority responsibly to direct and assign work to the Computer Technicians, discipline employees and effectively recommend hiring. The Employer also contends that Rinaldi is a supervisor because when Panzo was the Technical Support Supervisor she exercised supervisory authority and because the job description indicates that the position has supervisory authority.

The record fails to establish that Rinaldi has independent authority to direct or assign work to the Computer Technicians. Thus, Panzo, not Rinaldi, assigned duties to the Computer Technicians during October, November, and December. Even when Rinaldi began to assign work in January, Panzo reviewed these assignments with him. She also frequently countermanded his assignments and Rinaldi ceased assigning work. Although Panzo later told Rinaldi that she would stop changing the assignments, there is no evidence indicating that her

practice in fact changed. Thus, during Rinaldi's tenure as Technical Support Supervisor, his authority to assign work to Computer Technicians was so circumscribed by Panzo as to preclude a finding that he used independent judgment. Additionally, the assignments were based in significant part on the Computer Technicians' particular areas of specialization and such assignments do not require independent judgment. See *Providence Hospital*, 320 NLRB 717, 731-732 (1996).¹⁰ The record also does not establish that Rinaldi has the authority effectively to recommend hiring. Although Rinaldi once screened resumes for Panzo, she did not entirely rely on his judgment, inasmuch as she interviewed applicants other than the four that Rinaldi had recommended, and she initially offered the Computer Technician position to one of those applicants. The Board has held that the authority to screen resumes and recommend that certain applicants not be interviewed, even if those recommendations are followed, is not sufficient to establish the authority effectively to recommend the hire of employees. *International Center for Integrative Studies/The Door*, 297 NLRB 601, 602 (1990). The evidence is in conflict as to whether Rinaldi recommended a family friend to Panzo before he was hired and therefore it cannot form the basis for a supervisory finding. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Moreover, even if Rinaldi had recommended this individual for employment, the record does not establish that Rinaldi exercised the requisite independent judgment necessary for a finding of statutory supervisory authority with respect to his hiring. See *F.A. Bartlett Tree Expert Co., Inc.*, 325 NLRB 243, 245 (1997). Additionally, the record does not establish that Rinaldi has the authority effectively to recommend discipline. On one occasion, Rinaldi talked to an employee about spending excessive time on personal telephone calls, but there is no record evidence that the discussion had any effect on the employee's employment status. Thus, the discussion falls far short of establishing disciplinary authority. *Alois Box Co., Inc.*, 326 NLRB 1177 (1998). The record does not establish that Rinaldi has the authority to evaluate employees and affect their wages. In this regard, although Panzo prepared evaluations when she was the Technical Support Supervisor, it is not clear whether she retained this authority after becoming the Director of Technology or ceded it to Rinaldi. The Employer highlighted Rinaldi's lack of authority over personnel matters by promoting a Computer Technician to the Lead Service Support Technician position without seeking Rinaldi's input. Rinaldi additionally has not attended supervisory meetings or a supervisory training conference, and Panzo, not Rinaldi, grants time off to Computer Technicians and approves their timesheets. Although Rinaldi is paid more than the other technicians, this secondary indicium of supervisory status cannot transform him into a statutory supervisor in the absence of any evidence that he possessed at least one of the statutory indicia. *Billows Electric Supply of Northfield, Inc.*, 311 NLRB 878, fn. 2 (1993). Job descriptions indicating that a position has responsibility for supervising employees is insufficient, in and of itself, to establish supervisory status. *North Miami Convalescent Home*, 224 NLRB 1271, 1274 (1976). Similarly, while Panzo may have told Rinaldi that he had supervisory authority, mere statements of authority, never exercised, are insufficient to justify a finding of supervisory status. *Bowne of Houston, Inc.* 280 NLRB 1222, 1225 (1986). The record shows that Rinaldi spent the vast majority of his time performing networking and other technical duties, rather than directing the work of the other technicians. Although the Employer insists

¹⁰ *Midwestern Mining & Reclamation*, 277 NLRB 221, 246 (1985), cited by the Employer, is distinguishable. In that case the Board found that the fact that supervisors performed unit work during an extended emergency did not preclude a finding that they were statutory supervisors. In that case, however, the evidence clearly showed that they performed supervisory work before the emergency arose, whereas in this case the record did not establish that Rinaldi ever performed supervisory duties.

that Rinaldi has the same authority that Panzo possessed when she served as Technical Support Supervisor, the record shows that she has retained virtually all of this authority in her new position, and has not granted Rinaldi any of the supervisory indicia set forth in Section 2(11). Based on the foregoing, I find that the Employer has not carried its burden of proving that Michael Rinaldi is a supervisor within the meaning of the Act.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time computer technicians, lead service support technician, and technical support supervisor employed by the Employer, excluding all other employees, guards, and supervisors, as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently,¹¹ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

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LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759

¹¹ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

(1969). Accordingly, it is hereby directed that an election eligibility list, containing the *full* names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **May 24, 2001**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of 3 copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **May 31, 2001**.

Signed: May 17, 2001

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

177-8560-1500

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